85-761 (1)

No.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

GLEN BORYS,

Respondent,

vs.

UNITED STATES OF AMERICA,

Petitioner.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether a person's statement that he has lost his identification can create a reasonable suspicion of criminal activity sufficient to justify his detention and the seizure of his luggage under the Fourth Amendment?

2. Whether a seventy-five-minute seizure of a person's luggage based only on the law enforcement officer's suspicion that the luggage contained contraband is unreasonable under *United States v. Place*?

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IN THE

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GLEN BORYS,

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vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PRAYER

Petitioner, Glen Borys, respectfully prays that a Writ of Certiorari issue to review the judgment and order of the United States Court of Appeals for the Seventh Circuit.

OPINIONS BELOW

The Opinion and Order of the United States Court of Appeals Seventh Circuit appears in Appendix, attached hereto. The Order of United States Court of Appeals denying a Petition

for Rehearing *En Banc* appears in Appendix B, attached hereto. The Judgement Order and Sentence of the United States District Court for the Northern District of Illinois appears in Appendix C, attached hereto.

JURISDICTION

The Opinion and Order of the United States Court of Appeals for the Seventh Circuit was entered on June 27, 1985. A Petition for Rehearing with *En Banc* suggestion was denied in an order entered on August 21, 1985. This Petition is filed within 60 days of said ruling of the United States Court of Appeals for the Seventh Circuit, and jurisdiction is invoked under 28 U.S.C. § 1254.

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF THE CASE

On September 4, 1981, DEA agents Peter O'Brien and Milo Grassman were assigned to observe and stop passengers on flights arriving at Chicago's O'Hare Airport. Carrying two garment bags, Petitioner Glen Borys was one of the first passengers to leave a plane which had arrived at about 4:00 p.m. from Orlando, Florida. The agents focused on Borys because he displayed some of the characteristics of the drug courier profile. O'Brien had been assigned to the O'Hare

Airport detail for just three years when he confronted Glen Borys. He admitted that of the approximately nine hundred people at O'Hare that O'Brien had approached and questioned on the basis of his drug courier profile, only approximately fifty were ever arrested on probable cause that they were carrying illegal drugs.

The agents attempted to follow Borys from the gate to the main terminal, but lost sight of him because he was walking fast. Minutes later, the agents found Borys in the baggage claim area in the lower level of the main terminal and asked to speak to him, to which Borys replied, "Sure, what do you want?" When asked to produce identification, Borys told the agents that he had lost his wallet on the flight. Borys had in fact lost his wallet in the Orlando airport. Borys asked if he could go to the Delta ticket counter to inquire about his wallet and the agents agreed.

The agents accompanied Borys to the upper level while he spoke with a Delta employee. After Borys spoke with the airline employee, Agent O'Brien asked Borys if he had his ticket and where his journey had originated. Borys told O'Brien that he did not have his ticket and that he was returning from a four-day trip to Orlando.

Borys then returned to the counter to talk to the Delta agent again. O'Brien observed the Delta employee hand Borys a ticket folder, which O'Brien subsequently asked to see. Borys complied and O'Brien saw that the ticket was in Borys' name, had been purchased with cash, was a first-class-round-trip ticket, and that Borys had been in Florida ten days.

O'Brien returned the ticket to Borys; Borys informed the agents that he had to file a claim with the Delta baggage claim office on the lower level. The agents accompanied Borys to the lower level. It was not until they reached the lower level, after Borys had been tailed by the two federal agents for some time, that Borys began to appear nervous. Borys asked if he could

make a phone call and was permitted to do so. After the phone call, O'Brien told Borys that he and Grassman believed that Borys was transporting drugs and asked to search Borys' luggage, advising him of his right to refuse. Borys refused consent and the three returned to the Delta baggage office where they were joined by two other DEA agents.

The agents observed Borys remove a brief case from one of his garment bags. O'Brien told Borys that he was not under arrest, but that the luggage would be detained and an attempt made to secure a search warrant. Borys asked if he could keep the briefcase. One of the agents told Borys that, unless he agreed to a search of the briefcase, it would be detained. Borys was again advised of his right to refuse and he then agreed to a search of the briefcase. The agents searched the case and found what seemed to be paraphernalia used to "free base" cocaine. The agents confiscated the paraphernalia and returned the briefcase.

O'Brien wrote a receipt for Borys' pieces of luggage. Borys was never informed of the expected duration of the detention of his luggage. The agents did explain how he could recover his bags should no warrant be obtained or no drugs found. Borys left the airport at about 4:45 p.m. The agents took the luggage to the DEA airport office, where they contacted the United States Custom Service and requested the services of a narcotics detection dog for a "sniff" test. The dog arrived at about 6:00 p.m. and reacted positively to Borys' luggage, which had been placed in a room with three other bags. Agent O'Brien applied for a search warrant and it was approved by an Illinois state judge at 9:55 p.m. A search of the luggage yielded several different packages of cocaine.

The district court denied Petitioner's motion to suppress the paraphernalia and the packages of cocaine. Glen Borys was found guilty after a bench trial of one count of knowingly possessing cocaine with the intent to distribute in violation of 21 U.S.C. § 841(a)(1).

REASONS FOR GRANTING THE WRIT

The issues presented by this Petition for Writ of Certiorari are of considerable importance to the protection of the right to be free on reasonable seizures which is guaranteed by the Fourth Amendment to the United States Constitution. Motivated by the laudible purpose of controlling narcotics trafficking, overzealous federal drug agents are randomly detaining airline passengers and luggage. The DEA agents in this case, like details at other airports across the country, were on a special assignment to observe incoming passengers from source cities, stop and interrogate them and elicit consent so that they can search passengers for drugs. The instant case is not an isolated highway stop or street encounter. The fact pattern here is identical to many, many cases now before the Circuit Courts and the District Courts.

The Court of Appeals held that Glen Borys was seized for the purpose of Fourth Amendment analysis when the DEA agents accused him of transporting narcotics and sought to search his luggage. However, the Court of Appeals' holding that this seizure was supported by a reasonable suspicion of criminal activity conflicts with this Court's decision in *Terry v. Ohio*, 392 U.S. 1 (1968). In addition, the lower court's holding that the unexplained delay of seventy-five minutes before the luggage was submitted to a "sniff" test was not an unreasonable detention is contrary to this Court's holding in *United States v. Place* 462 U.S. 696 (1984).

The Court of Appeals' Holding That The Petitioner's Failure To Produce Identification Upon The Request of The DEA Agents Created a Reasonable Suspicion of Criminal Activity is Contrary to *Terry v. Ohio*

A reasonable suspicion of criminal activity is not established by a failure or refusal to present identification upon the request by a law enforcement officer. In *Terry v. Ohio*, 392 U.S. 1 (1968), this Court held that the Fourth Amendment per-

mitted brief investigative detentions based upon a reasonable suspicion that criminal activity was afoot. However, as Justice White noted "[T]he persons stopped is not obliged to answer, answers may not be compelled, and refusal to answer furnishes no basis for an arrest, although it may alert the officer to the need for continued observation." 392 U.S. at 34 (concurring opinion). See also *id.* at 32, 33 (Harlan J., concurring).

Thus, this Court held in *Brown v. Texas,* 443 U.S. 47 (1979), that a *Terry* detention of a person for the purpose of requiring him to identify himself violated the Fourth Amendment. The Court stated:

> The Texas statute under which appellant was stopped and required to identify himself is designed to advance a weighty social objective in larger metropolitan centers: prevention of crime. But even assuming that purpose is served to some degree by stopping and demanding identification from an individual without any specific basis for believing he is involved in criminal activity, the guarantees of the Fourth Amendment do not allow it. When such a stop is not based on objective criteria, the risk of arbitrary and abusive police practices exceeds tolerable limits.

443 U.S. 52. See also *Kolender v. Lawson,* 461 U.S. 352, 362 (1983) (Brennan, J. concurring).

In the context of airport detentions, this Court has reaffirmed its view that a person's failure or refusal to answer the questions of narcotics agents does not create a permissible basis for detention.

> The person approached, however, need not answer any question put to him; indeed, he may decline to listen to the questions at all and may go on his way. . . . He may not be detained even momentarily without reasonable, objective grounds for doing so; ***and his refusal to listen or answer does not, without more, furnish those grounds.***

Florida v. Royer, 461 U.S. 491, 497-98 (1983) (plurality opinion) (citations omitted) (emphasis added).

If a person must produce identification during a *Terry* stop or have the officers draw the inference of criminal activity, then the person is in no sense free to disregard the questions and walk away. Thus, two Circuit Courts of Appeals—including the Seventh Circuit—have held that the failure or refusal to present identification upon request of a law enforcement officer cannot be considered by the officers as evidence of criminal conduct. *Moya v. United States,* 761 F.2d 322, 325 (7th Cir. 1985); *United States v. Brown,* 731 F.2d 1491, 1494 (11th Cir. 1984), *modified on other grounds,* 743 F.2d 1505.

When Glen Borys told the federal drug agents that his wallet was lost he was telling the truth. His wallet was indeed lost and was later found at the Orlando airport several days after his detention at O'Hare. Thus Borys was not deliberately attempting to mislead the agents. But even if he was, *Terry* and its progeny did not permit them to draw an inference that criminal conduct was afoot. As the Seventh Circuit itself stated in *Moya,* "There are several innocent explanations for a lack of forthrightness with law enforcement officers." 761 F.2d at 325.

Clearly, the other facts observed by agent O'Brien and his partners were insufficient to create a reasonable suspicion of criminal activity. The facts typically associated with the "drug courier profile"—such as that Borys came from a source city for narcotics, the kind of luggage he carried, that he had a first ticket purchased with case, etc.—are "meaningless as they would describe a very large category of presumably innocent travelers." *Reid v. Georgia,* 448 U.S. 438, 441 (1980) (per curiam).

In addition, the fact that Petitioner gave the agents an inaccurate answer as to the length of his stay in Florida did not create the individualized suspicion necessary to justify a detention. When the agents asked the Petitioner how long he had stayed in Florida, he told them four days, although his ticket stated that he had been in Florida for ten days. The Court of

Appeals found this fact persuasive. App. 12a - 13a. However, in order for a suspicion to be reasonable, the officer must articulate why he correlates certain behavior with criminal activity. "[S]ome quantum of individualized suspicion is a prerequisite to a constitutional search or seizure" *United States v. Martinez-Fuente,* 428 U.S. 543, 560 (1960); *United States v. Cortez,* 449 U.S. 414, 418 (1981). Without any explanation as to why certain acts or characteristics raise a suspicion of criminal activity, then the characteristics can be shaped to fit the conduct instead of the other way around. Thus, if the Petitioner had erroneously stated that he had been in Florida for fourteen days, he would have been suspected; or if the Petitioner had said he had been in Florida one month, he would have been suspected.

Agent O'Brien offered no explanation as to why he thought that the fact that Borys had stayed in Florida longer than he had claimed was probative of a drug courier activity. Agent O'Brien candidly admitted the fallibility of the airport drug agent. Of the approximately nine hundred people that O'Brien approached and questioned during his time at O'Hare Airport, only approximately fifty were ever arrested on probable cause that they were carrying illegal drugs. In almost nine times out of ten, O'Brien's hunches as to criminal activity proved to be wrong! Even the Court of Appeals conceded that it could not conceive of a criminal purpose for Borys' misstatement. App. 12a - 13a. Without any explanation as to why Borys' misstatement was significant to the agent, his misstatement is too "susceptible to the distortion of hindsight." *United States v. Martinez-Fuente,* 428 U.S. at 565, to satisfy the Fourth Amendment. Agent O'Brien's airport investigatory activity was the very kind of random, arbitrary government action which the Fourth Amendment prohibits.

Accordingly, the Court of Appeals' determination that the federal drug agents' seizure of the Petitioner was supported by

reasonable suspicion is contrary to this Court's decision in *Terry v. Ohio.*

The Court of Appeals' Determination that the Agent's Unexplained Delay of Seventy-Five Minutes Before Subjecting Borys' Luggage to a "Sniff" Test was Reasonable is Contrary to *United States v. Place*

Even if one assumes *arguendo* that Agent O'Brien had a reasonable suspicion of criminal activity, the detention of Petitioner's garment bags for seventy-five minutes before subjecting them to a sniff test was an unreasonable seizure. The Court of Appeals' determination that the agents' conduct was reasonable cannot be reconciled with this Court's holding in *United States v. Place* that a ninety-minute detention of luggage is unreasonable. The Court below erroneously removed from the government the burden of demonstrating that the seventy-five-minute detention was reasonable.

In *United States v. Place* 462 U.S. 696 (1984), this Court held that the ninety-minute detention of a passenger's luggage *alone* was unreasonable in absence of probable cause. *Id.* at 709. This Court made clear that while

> the ninety-minute detention of Respondent's luggage is sufficient to render the seizure unreasonable, the violation *was exacerbated* by the failure of the agents to accurately inform Respondent of the place which they were transporting his luggage, of the length of time he might be dispossessed, and of what arrangement would be made for return of the luggage if the investigation dispelled the suspicion.

Id, at 710.

The Court of Appeals misread *Place* as invalidating the seizure involved there *because* of the presence of certain exacerbating factors. However, this Court's opinion is clear that the lengthy unexplained detention itself was unconstitutional. The Petitioner submits that the fifteen-minute difference in the

detention period in *Place* and in the case at hand is not constitutionally significant. Thus, even if no exacerbating factors were present in this case, the unexplained detention of a person's luggage for seventy-five-minutes is unreasonable. However, one of the factors present in *Place* is also present in the case at bar. The Petitioner was never informed of the expected duration of the detention. The actions of the agents may well have led him to believe that his luggage would be held at least over night. Because the agents refused to inform Borys how long his luggage would be seized, Borys had no way of knowing how long he would have had to wait.

The burden is upon the government to demonstrate that a seizure is sufficiently limited in scope and duration. *Florida v. Royer,* 460 U.S. 491, 500 (1983). Therefore the government had to explain why it took four DEA agents seventy minutes to transport the Petitioner's luggage from one terminal to another in the same airport. The Court below improperly removed the burden from the government by offering hypothetical explanations. App. 17a. It is manifestly erroneous for an appellate tribunal to presume facts not found in the record. If there had been circumstances which made the seventy-five minute delay reasonable, then the government clearly would have offered those facts at trial. In the absence of any explanation as to why it took seventy-five minutes to transport Petitioner's luggage from one terminal to another, *Place* compels the conclusion that the detention of Petitioner's luggage in this case was unreasonable under the Fourth Amendment.

CONCLUSION

The confusion which will result from the Seventh Circuit Court of Appeals failure to follow this Court's holdings in *Terry v. Ohio* and *United States v. Place* will make it impossible for police officers to adhere to the requirements of the Fourth Amendment and for district courts to enforce those requirements in the context of airport detentions.

For the foregoing reasons, Petitioner Glen Borys, respectfully prays that this Honorable Court issue its Writ of Certiorari to review the judgment and order of the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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APPENDICES

APPENDIX A

UNITED STATES of America,
Plaintiff-Appellee,

v.

Glen BORYS, *Defendant-Appellant.*

No. 84-1895.

United States Court of Appeals,
Seventh Circuit.

Argued Jan. 24, 1985.
Decided June 27, 1985.

Before CUMMINGS, Chief Judge, CUDAHY, Circuit Judge, and PELL, Senior Circuit Judge.

CUMMINGS, Chief Judge.

Defendant Glen Borys was found guilty after a bench trial of one count of knowingly and intentionally possessing cocaine with intent to distribute in violation of 21 U.S.C. § 841(a)(1). He was subsequently sentenced to eighteen months imprisonment, followed by a three-year special parole term. Prior to trial and after a hearing on stipulated facts at which one of the Drug Enforcement Agency ("DEA") Special Agents involved, Peter O'Brien, testified, the court below denied defendant's motion to suppress. He filed a timely notice of appeal, and we have jurisdiction pursuant to 28 U.S.C. § 1291. We affirm the conviction.

I

The essential facts are not in dispute. On September 4, 1981, DEA agents O'Brien and Milo Grassman were monitoring arriving flights at Chicago's O'Hare Airport. At about 4:00 p.m., Borys was one of the first passengers to deplane from

Delta Flight #558 from Orlando, Florida, a known "source" city of narcotics. Several factors focused O'Brien's and Grassman's attention on Borys. Usually passengers deplaning first are well-dressed business people, traveling first class (Stip. ¶ 2). In contrast, Borys was dressed casually, had collar-length hair, and a Fu Manchu-type mustache. He was carrying two bulky garment bags, although O'Brien testified that generally first-class passengers checked through such luggage. Borys walked down the concourse rapidly, which O'Brien also thought was unusual since the plane had arrived on time. As Borys walked toward the terminal proper, he looked back in the direction of O'Brien and Grassman before continuing down the concourse.

The two agents began to follow Borys. At the main terminal area, Borys boarded an escalator to the American Airlines luggage area below. But because he was walking so fast, the agents lost sight of him by the time they reached the baggage claim area. After looking for him unsuccessfully in the adjoining Delta baggage claim area, the agents located him outside the terminal by a livery stand. He then reentered the airport, walking rapidly past the two agents, and went behind a luggage lock-up area next to U.S. Air's baggage claim, where he was hidden from view from everyone in the area for about fifteen seconds. After the defendant emerged, the agents approached him, identified themselves as federal drug agents, and requested to speak to him, to which he responded "Sure, what do you want?" (Stip. ¶ 5). O'Brien asked Borys for identification, to which he replied that he had lost his wallet on the flight. Borys asked if he could go to the Delta ticket counter to inquire about his missing wallet. The agents said "Sure, go ahead; go find your wallet" (*id*).

Borys returned to the upper level of the air terminal where he spoke to a Delta agent concerning the lost wallet. The two agents followed but remained some distance away by the escalators (*id.*). After Borys' conversation with the Delta

agent, O'Brien asked him if he had his airline ticket, and he replied no. O'Brien asked his name, and he replied "Glen Borys." Borys was asked where he was coming from, and he replied that he was returning from a four-day trip to Orlando.

Borys then returned to the counter to talk to the Delta agent. O'Brien observed the Delta employee hand Borys a ticket folder, which O'Brien subsequently asked to see. Borys complied with this request; O'Brien saw that the ticket was in Borys' name, had been purchased for cash, was a first-class Chicago-Orlando-Chicago ticket, and that Borys had been in Florida ten days. O'Brien returned the ticket to Borys.

Borys then informed the agents he had to file a claim with Delta Airlines so that he could recover his wallet. The two agents followed Borys down to the Delta baggage claim office on the lower level. At the Delta Airlines baggage claim area, Borys was visibly shaken and continuously dropped various items (Stip. ¶ 6). He asked if he could make a phone call and was permitted to do so.

Borys continued to be visibly nervous (Stip. ¶ 7). O'Brien explained that he and Grassman had reason to believe that Borys was transporting drugs, and asked permission to search Borys' luggage, advising him of his right to refuse (*id.*). Borys refused consent, and the four returned to the vicinity of the Delta baggage office, at which point they were joined by DEA Special Agents Anderson and Fulkerson.

Anderson observed Borys remove a briefcase from one of his pieces of luggage. O'Brien told Borys that he was not under arrest, but that the luggage would be detained and an attempt made to secure a search warrant (*id.*). Borys asked if he could keep the briefcase. Anderson replied he could if he would consent to a search of it; otherwise it would be detained and an attempt made to secure a warrant (*id.*). Borys again was advised of his right to refuse, but he said "O-k, go ahead and search it, I want that briefcase" (*id.*). Anderson searched the

case and found several cassette tapes and a neoprene tube with a black plastic cap that appeared to have some white powder residue and seemed to be paraphernalia used to "free base" cocaine (*id.*). Anderson confiscated the tube and returned the briefcase to Borys. O'Brien wrote a receipt for Borys' two pieces of seized luggage and explained how he could recover his bags should no warrant be obtained or no drugs found (*id.*). Borys then left the airport at about 4:45 p.m.

O'Brien and Grassman took the luggage to the DEA Airport Office, where they contacted the U.S. Customs Service and requested the services of a U.S. Customs narcotics detection dog for a "sniff" test (Stip. ¶ 8). The dog arrived at about 6:00 p.m. and reacted positively to Borys' luggage, which had been placed in a room with three other bags (*id.*). O'Brien applied for an Illinois State Search Warrant, and it was approved at 9:55 p.m. (*id.*). A search of the luggage yielded approximately 973.-19 grams of a mixture containing cocaine in several different packages in both pieces of luggage (*id.*). Borys now contends that this evidence must be suppressed. He vigorously argues that: (1) he was "seized" when O'Brien and Grassman first approached and questioned him, (2) they did so without the requisite reasonable suspicion that he was carrying drugs, (3) the investigative stop ripened into a full arrest for which probable cause was required, and (4) therefore the warrant to search his luggage should be quashed. Borys also argues that his consent to search his briefcase was not voluntary. We reject his arguments, as did Judge Plunkett.

II

The Fourth Amendment provides that the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated." U.S. Const. amend. IV. In *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889, the Supreme Court authorized as

reasonable under the Fourth Amendment limited investigative questioning by law enforcement officers. Guiding the Court in *Terry* was the substantial government interest in preventing crime and apprehending criminals, an interest that can justify some but not unlimited intrusion on an individual's interests. *Id.* at 20-22, 88 S.Ct. at 1879-1880. The Court has recently given additional guidance in sketching the parameters of what the Fourth Amendment allows short of a full arrest. *Florida v. Royer,* 460 U.S. 491, 103 S.Ct. 1319, 75 L.Ed.2d 229, dealt with investigative detentions of people, while *United States v. Place,* 462 U.S. 696, 103 S.Ct. 2637, 77 L.Ed.2d 110, involved investigative detentions of luggage. The instant case raises both issues. We will address first Borys' encounter with the agents.

[1] Not all police questioning of citizens implicates the Fourth Amendment. Consequently, the threshold question is whether a seizure has occurred. *Royer,* 460 U.S. at 497-498, 103 S.Ct. 1323-1324; *Terry,* 392 U.S. at 19 n. 16, 88 S.Ct. at 1879 n. 16; *United States v. Morgan,* 725 F.2d 56, 58-59 (7th Cir. 1984). If a seizure of some sort has occurred, the inquiry becomes whether the detention amounted to a full-blown arrest, requiring probable cause, or whether it was only a limited investigative stop—a so-called *Terry* stop. If the seizure was an investigative detention, then adequate justification for the intrusion must exist, and the encounter's scope must be sharply limited. *Terry,* 392 U.S. at 20.

[2-5] Specifically the Fourth Amendment requires that reasonable suspicion support investigative stops. An investigating officer's subjective good faith or "inarticulate hunches," *id.* at 22, 88 S.Ct. at 1880, are insufficient. Instead, the officer must be able "to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion." *Id.* at 21, 88 S.Ct. at 1880 (footnote omitted). The court then must balance the governmental interests at stake against the individual's Fourth Amendment interests from intrusion on personal security.

United States v. Hensley, ___ U.S. ___, ___, 105 S.Ct. 675, 680, 83 L.Ed.2d 604; *United States v. Brignoni-Ponce*, 422 U.S. 873, 878, 95 S.Ct. 2574, 2578, 45 L.Ed.2d 607; *Terry*, 392 U.S. at 20-21, 88 S.Ct. at 1879. The stop "must be temporary and last no longer than is necessary to effectuate the purpose of the stop. Similarly, the investigative methods employed should be the least intrusive means reasonably available to verify or dispel the officer's suspicion in a short period of time." *Royer*, 460 U.S. at 500, 103 S.Ct. at 1325.

[6, 7] To determine the threshold issue of whether the defendant was seized, the applicable standard is the objective test that Justice Stewart, joined by Justice Rehnquist, articulated in *United States v. Mendenhall*, 446 U.S. 544, 100 S.Ct. 1870, 64 L.Ed.2d 497. Justice Stewart wrote:

> We conclude that a person has been "seized" within the meaning of the Fourth Amendment only if, in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave. * * * The respondent was not seized simply by reason of the fact that the agents approached her, asked her if she would show them her ticket and identification, and posed to her a few questions. Nor was it enough to establish a seizure that the person asking the question was a law enforcement official.

Id. at 554-555, 100 S.Ct. at 1877 (footnote omitted). Although the precedential value of Justice Stewart's plurality opinion may be limited by its commanding the support of only one other Justice, cf. *United States v. Saperstein*, 723 F.2d 1221, 1225-1226 (6th Cir. 1983) (*Mendenhall* at best prescribes outer bounds of what is permissible), it is the law of this Circuit. *Morgan*, 725 F.2d at 58-59; *United States v. Black*, 675 F.2d 129, 133-134 (1982), certiorari denied, 460 U.S. 1068. We explained in *Black*, 675 F.2d at 134, that "[a]s long as a person remains at liberty to disregard a police officer's request for information, no constitutional interest is implicated." Relevant factors in determining whether a reasonable person would feel

free to leave include the conduct of the police, the person of the individual citizen, and the physical surroundings of the encounter. *Morgan,* 725 F.2d at 59; *Black,* 675 F.2d at 134.

A substantial amount of confusion arises from the district court's consideration of whether Borys was seized, and if so whether it was reasonable under the circumstances. The court below incorrectly equated consensual questioning, which the Fourth Amendment does not address and which does not involve a seizure, with investigative detentions, which are seizures within the meaning of the Fourth Amendment but do not require probable cause due to the special limits placed on their use. The flaw in the district court's analysis lies in its considering the Fourth Amendment concept of seizure as implicating only a full-blown arrest based on probable cause. Actually, a seizure may encompass either an arrest or an investigative detention. The arresting officers must have probable cause to justify their effecting an arrest. To detain someone, they need only reasonable suspicion, provided their detention is limited in scope and duration, and is comprised of the least restrictive means available. But if the encounter does not constrain the citizen's liberty, and is questioning which a reasonable person would feel free to discontinue should such a person desire to terminate the conversation, then no seizure at all has occurred and the officer need not justify the encounter.

Despite this confusion in the lower court, a close reading of its opinion suggests it fits into the appropriate framework. The district judge began his analysis by unequivocally stating that "the agents did not stop Borys when they initially approached him" (Memo. Opinion and Order at 6). As our reiteration of the facts, *infra,* makes clear, this determination suggests that the initial contact between Borys and the two DEA agents did not constitute even a *Terry* stop. With that conclusion we agree. The judge then continued to discuss the ensuing forty-five-minute encounter between Borys and the agents as a *Terry* stop. We believe that the encounter, which began as a consensual

one, did in fact evolve into an investigative detention, making much of the lower court's analysis relevant. We also agree with the ultimate conclusion below that the agents did not exceed the scope of their justification in their contact with Borys.

[8] For purposes of clarity in future cases, several points must be emphasized. First, to the extent that the lower court considered O'Brien's and Grassman's initial questioning of Borys as a justifiable investigative detention, that conclusion is in error. If that contact indeed were an investigatory stop, then it would be unreasonable because of the agents' lack of reasonable suspicion. Borys' dress and behavior alone were insufficient to justify detention. See *Reid v. Georgia,* 448 U.S. 438, 440-441, 100 S.Ct. 2752, 2753-2754, 65 L.Ed.2d 890 (defendant's conformity with "drug courier" profile insufficient in and of itself to justify detention). Only when the agents questioned Borys did they acquire sufficient facts to justify detaining him. This questioning was permissible, because nothing in the facts suggests that the agents questioned Borys in a manner that would have made a reasonable person in his situation feel he could not leave, at least until Borys and the agents returned to the lower level and they informed him they suspected him of drug trafficking and wanted to search his luggage. See *infra* p. 311. Second, the district court collapsed two lines of analysis into each other. The discussion of whether a reasonable person would have felt free to leave, including consideration of the agents' conduct, Borys as an individual, and where the encounter took place, pertains exclusively to whether the questioning was consensual or whether it amounted to an investigatory detention invoking the Fourth Amendment. Only once a court has determined that the encounter was an investigatory stop does the separate inquiry into the justification for the stop, and its scope and duration, become relevant. Third, we reiterate the suggestion we made in *United States v. Notorianni.* 729 F.2d 520, 523 (1984), that district judges should make specific findings of fact concerning whether a

reasonable person in the defendant's position would have felt free to terminate the questioning. Had the court below clearly made this finding and then concluded (as we think it implicitly did) that at some point the encounter evolved into a detention, then this Court's task of reviewing that decision would be simplified. In this case, the facts are clear, so that we can evaluate them properly in light of our earlier cases. Had the situation been otherwise, our review might have involved fact-finding in the first instance, which is an inappropriate exercise for an appellate tribunal. Cf. *United States v. Sharpe*, ____ ____ U.S. ____, ____, 105 S.Ct. 1568, 1586-1588, 84 L.Ed.2d 605 (Brennan, J., dissenting) (Court engaged in *de novo* factfinding by reaching out to decide issue not presented for Supreme Court review); *Notorianni*, 729 F.2d at 523-524 (Cudahy, J., dissenting) (panel decision that no seizure had occurred was inappropriate fact-finding in absence of unequivocal determination by the district court that one in defendant's position would have felt free to leave).

[9] The agreed-upon facts in this case justify our determination that the district court correctly found that the agents' initial questioning of Borys was consensual. The agents did not delay Borys or alter his movement around the terminal, allowing him to inquire after his wallet and make a personal phone call. The agents in fact followed Borys and remained at a distance while the defendant twice talked to the Delta Airlines employee at the ticket counter. The agents' questioning was conducted completely in the public areas of the airport; they did not even suggest to Borys that they move to one side, thereby indicating minimal control over Borys by the agents. See *Morgan*, 725 F.2d at 59 (no seizure although officers asked defendant to move out of pedestrian traffic while they questioned her); *Black*, 675 F.2d at 135 (no seizure during initial contact up to and including time Chicago police officer suggested the group move to the side of the concourse).

The questioning here was also quite limited. While on the upper level, O'Brien asked Borys for identification and for his name, whether he could see Borys' ticket, and how long he had been in Orlando. Such questions and conduct are not overly intrusive. The Supreme Court made very clear in *Royer, supra,* that officers' questioning individuals who are willing to listen in a public place does not amount to a seizure. 460 U.S. at 497, 103 S.Ct. at 1323. O'Brien did ask to see Borys' ticket twice, which might in some circumstances suggest an attempt to intimidate the suspect, but O'Brien did so the second time only after seeing the Delta agent hand a ticket folder to Borys. In no way was he pressuring Borys. Once O'Brien glanced at the ticket, he returned it to Borys. Officers' retaining airline tickets and driver's licenses has been a crucial factor in finding that a seizure has occurred. Suspects deprived of their ticket and identification are effectively deprived of the practical ability to terminate the questioning and leave. See *id.* at 501, 103 S.Ct. at 1325 (Royer detained when asked to accompany narcotics agents who had retained his plane ticket and driver's license without indicating he was free to depart to police room); *United States v. Cordell,* 723 F.2d 1283, 1285 (7th Cir. 1983) (consensual questioning ripened into investigative stop when one officer handed airline ticket and driver's license to second officer), certiorari denied, ____ U.S. ____, 104 S.Ct. 1291, 79 L.Ed.2d 693; *Black,* 675 F.2d at 136 (same). Borys' quickly retrieving his ticket refutes any impression a reasonable person might have that he was being detained. In any case, nothing suggests that the questioning was so intense and so repetitive that it could amount to interrogation.

Although Borys spent forty-five minutes in the airport from the time he deplaned until he finally left, the time during which the agents questioned him was quite brief. Continual interrogation for forty-five minutes would present a completely different picture from the sporadic questioning spanning three-quarters of an hour at issue here. Cf. *Royer,* 460 U.S. at 502-503, 103 S.Ct. at 1326-1327 (continued questioning in private,

enclosed room when officers had detained defendant's driver's license and airline ticket and retrieved his luggage without his consent was unreasonably intrusive investigative detention); *United States v. Gooding,* 695 F.2d 78, 82 (4th Cir.1982) (defendant seized when, among other things, officers continued questioning).

Borys emphasizes that his "asking" O'Brien and Grassman whether he could try to retrieve his missing wallet, his telling them where he was going and why, and his asking them if he could make a phone call, indicate that he did not feel free to leave. And perhaps he did not. But the question is not what Borys actually felt, but what a reasonable person in his situation would have believed. See *Notorianni,* 729 F.2d at 522. The circumstances do not suggest the coerciveness that would have caused a reasonable person to feel restrained. Moreover, Borys' comments are at best ambiguous; he could just as readily have been being polite when he phrased his remarks to the agents as questions rather than as declarative statements. At least until the time that Borys, followed by the two agents, returned to the lower level, the encounter had been completely consensual.

[10] But when the two agents explained that they suspected Borys of transporting drugs and asked permission to search his luggage, the consensual questioning had ripened into an investigative stop. Borys had been questioned about his identity and travel plans by two federal drug agents who had tailed him for some time before they finally informed him that they suspected him of a major crime and that they wanted to search his luggage. In these circumstances where Borys knew that the agents had positively identified him as a suspect, a reasonable person would not have felt at liberty to leave. See *United States v. Berry,* 670 F.2d 583, 597 (11th Cir.1982) (*en banc*) ("Statements which intimate that an investigation has focused on a specific individual easily could induce a reasonable person to believe that failure to cooperate would lead only to formal detention.") (footnote omitted).

Subsequent events confirm this conclusion. After Borys had made his phone call and refused consent to search his luggage, the two agents accompanied him back to the Delta baggage claim area, rather than following him as they had done earlier. There two other DEA agents joined the group, so that Borys was surrounded by four people he knew suspected him of carrying drugs. His being questioned by four people, while not probative, was highly indicative that by then a seizure had occurred. In *Notorianni,* 729 F.2d at 523, we determined that the questioning of four people by two officers did not constitute a seizure. Here, however, one person was being accosted by four agents, surely an intimidating situation for anyone. Although agent Anderson informed Borys he was not under arrest, O'Brien told him that his luggage would be detained unless Borys forfeited his right to refuse consent to a search of the two garment bags. In these circumstances the confrontation by four DEA agents constituted a seizure.

[11] Reasonable suspicion supported this investigative stop. As already noted, *Terry* and its progency require officers to point to objective facts to support their detaining an individual. In the instant case, Borys had arrived from a source city for narcotics. Although traveling firt-class, he had carried two bulky garment bags into and off the plane. He had purchased the first-class ticket with cash, he was dressed quite casually and he had no identification.[1] He was walking extremely fast, so fast the agents could not keep up. When questioned, he was extremely nervous, so much so that he continually dropped things. Finally, he gave the two agents a deceptive answer to the length of his stay in Florida. His stating that he had been in

[1] The stipulated facts inform us that Borys' wallet was indeed found in the Orlando airport several days after his detention at O'Hare. That his story of having lost his wallet was in fact true does not vitiate the suspiciousness to trained narcotics agents of his claiming to have no identification. What is relevant is what the facts and reasonable inferences therefrom would indicate to experienced officers at the time, not what later events proved the facts to be.

Florida only four days when he had in fact been there ten days deviates from the more usual picture of someone staying a very short period of time, perhaps only a few hours, but claiming to be gone for a longer period of time. The length of his stay, however, is not the relevant factor. What fueled the agents' suspicions, and justifiably so, was Borys' lying about how long he had been away rather than the actual length of the stay. Borys' dissembling, coupled to the other observed facts, would have indicated to O'Brien and Grassman that something was not right, thus justifying them in detaining Borys briefly.

[12] The government has also carried its burden of proving that the detention of the defendant was properly limited in scope and duration. The purpose of the stop was to verify or dispel the agents' suspicion that Borys was trafficking in illegal drugs, a legitimate and substantial government interest. *Royer,* 460 U.S. at 498-499, 103 S.Ct. at 1324-1325; *United States v. Mendenhall,* 446 U.S. at 561-562, 100 S.Ct. at 1880-1881 (Powell, J., plurality opinion). Once Borys was detained, the detention was quite brief. See *Royer,* 460 U.S. at 502-503, 103 S.Ct. at 1326-1327 (factor contributing to finding of unlawful arrest was officers' continued interrogation in a private room). Borys was asked twice for permission to search his luggage and was twice advised of his right to refuse consent, which he exercised. Thereafter, he was free to leave the airport, which he did. The investigative stop never matured into an arrest, and the Fourth Amendment was not violated.

III

[13] The more difficult question is whether the agents' seizure of Borys' luggage exceeded the bounds described by the Supreme Court in *Place, supra. Place* applied to seizures of personal luggage the standards articulated in *Terry, supra,* regarding seizures of individuals. 462 U.S. at 709, 103 S.Ct. at 2645. In *Place* the agents involved detained the defendant's

luggage for ninety minutes while they transported the bags from LaGuardia Airport, where defendant Place had been questioned, to Kennedy Airport, where a narcotics detection dog was available. The Second Circuit's assumption that reasonable suspicion existed to detain the bags was not at issue before the Supreme Court. Instead that Court's analysis focused on whether holding the bags for an hour and a half exceeded the allowable scope of an investigatory detention.

Applying to the case the limitations applicable to investigative detentions of the individual, the Court concluded that "[t]he length of the detention of respondent's luggage alone precludes the conclusion that the seizure was reasonable in the absence of probable cause." *Id.* It reached this conclusion by balancing "the nature and quality of the intrusion on the individual's Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion." *Id.* at 703, 103 S.Ct. at 2642. The Court observed that the ninety-minute detention was made intolerable by the interference it posed with the defendant's possessory interest in the luggage that he was carrying, as well as the restriction of his liberty interest occasioned by the disruption of his travel plans from having to remain with the luggage or continue on his way without it. *Id.* at 708-709, 103 S.Ct. at 2645.

Clearly the seventy-five-minute detention involved here, if permissible at all, is at the outer bounds of the Constitution. The Supreme Court was very clear in *Place* that although it was prescribing no hard-and-fast rule due to the necessarily fact-bound determinations affecting each individual investigatory stop, it had "never approved a seizure of the person for the prolonged 90-minute period involved here and [could] not do so on the facts presented by this case." *Id.* at 709-710, 103 S.Ct. at 2646.[2] We recently applied *Place* to find a three-hour

[2] Some language in the Supreme Court's recent decision in *United States v. Sharpe*, ____ U.S. ____, 105 S.Ct. 1568, 84 L.Ed.2d

(Footnote continued on following page.)

detention of luggage unreasonable. *Moya v. United States*, 761 F.2d 322, 327 (1984). While the instant situation presents a close question, we conclude that the seventy-five-minute detention involved lies within the outer bounds of the Fourth Amendment.

There are several significant differences between *Place* and the case at bar. The Court stated in *Place* that "the brevity of the invasion of the individual's Fourth Amendment interests is an important factor in determining whether the seizure is so minimally intrusive as to be justifiable on reasonable suspicion." 462 U.S. at 709, 103 S.Ct. at 2645. Nonetheless, "in assessing the effect of the length of the detention, we take into account whether the police diligently pursue their investigation." *Id.* Moreover, while

> the 90-minute detention of respondent's luggage is sufficient to render the seizure unreasonable, the violation was exacerbated by the failure of the agents to accurately inform respondent of the place to which they were transporting his luggage, of the length of time he might be dispossessed, and of what arrangements would be made for return of the luggage if the investigation dispelled the suspicion.

Id. at 710, 103 S.Ct. at 2646. In *Place*, although the agents knew Place would be arriving at LaGuardia Airport at a certain hour, no drug detection dog was at that airport and the agents

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(Footnote continued from preceding page.)

605, might suggest that the Court may be moving away from its emphasis on the duration of the stop as an important factor in assessing its reasonableness. Indeed, such a suggestion caused Justice Marshall to concur in the judgment only. *Id.* at _____, 105 S.Ct. at 1577.

This fear, however, would seem to be unfounded. In question in *Sharpe* was only a 20-minute detention, so that the case did not nearly approach the 90 minutes at issue in *Place, supra*, and in fact fit just within the American Law Institute's suggested limit on *Terry* stops of 20 minutes. See ALI, Model Code of Pre-Arraignment Procedure

(Footnote continued on following page.)

had seemingly made no effort to secure one. Had a dog been available at LaGuardia, thus avoiding the necessity of transporting the luggage all the way across Queens to Kennedy Airport, the detention would have been substantially shortened. Furthermore, the agents involved misled Place about where they were taking his luggage, telling him they were taking it to a federal judge to try to secure a search warrant.

In the instant situation, these exacerbating and contributing factors are missing. Admittedly the DEA agents did not inform Borys where they were taking his luggage or how long they intended to hold it, but they did tell him how he could retrieve his bags. Moreover, nothing in the record suggests that the agents were in any way lackadaisical in their attempt to establish the requisite probable cause for a search warrant. A narcotics detection dog was present at O'Hare Airport, so that

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§ 110.2(1) (1975). What concerned the Chief Justice, writing for the Court, was the Fourth Circuit's decision to adopt a *per se* time limit on all investigative stops. *Sharpe*, ____ U.S. at ____, 105 S.Ct. at 1575. In fact, Justice Marshall argued in his concurrence for such an established limit. *Id.* at ____, 105 S.Ct. at 1579-1581. The Court has repeatedly refused to adopt rigid rules, preferring instead case-by-case determination of reasonableness. The majority opinion acknowledged that a *Terry* stop could continue so long that it would become unreasonable and violate the protections afforded citizens by the Fourth Amendment. *Id.* at ____, 105 S.Ct. at 1575. But the opinion pointed out that while the time involved is an important factor, a court must also consider other factors, particularly law enforcement purposes.

Given the factual context of the case, and the decision of the Fourth Circuit invalidating a 20-minute detention, the Court's opinion appears to address only its determination that Fourth Amendment analysis remain flexible. It cannot be read as disavowing the repeated insistence in other similar cases that the length of the detention is crucial to analyzing whether the allowable limits of an investigative detention were exceeded. *See Hensley*, ____U.S. at ____, 105 S.Ct. at 683-684; *Place*, 462 U.S. at 709-710, 103 S.Ct. at 2645-2646; *Royer*, 460 U.S. at 500, 103 S.Ct. at 1325.

the detention was not prolonged needlessly by transporting Borys' luggage elsewhere. Nor did the agents mislead Borys regarding what they were doing with the bags. Many factors could contribute to the dog's not being immediately available. Several flights might have arrived at once. DEA agents such as O'Brien and Grassman could not predict precisely when they would require the services of a dog, for they do not have cause to suspect passengers on every flight they have under surveillance. They question only a small number of those they suspect, and even fewer are asked to consent to a search of their luggage. This inability to know in advance whether a dog will be needed means that imposing an absolute maximum time requirement would be overly burdensome, absent some indication that the agents were derelict in some way.

It must be emphasized that merely having a single narcotics detection dog available somewhere at a large and busy airport like O'Hare does not necessarily immunize a detention of luggage from the requirements of the Fourth Amendment. In *Moya*, we stated that "[t]he officers who apprehended Moya admitted that they stationed themselves at the airport specifically to investigate the transportation of illicit drugs. Under these circumstances, we believe it is reasonable to expect officers to arrange to have a narcotics detecting dog readily available." 761 F.2d at 327. The three-hour detention in *Moya* was clearly excessive, given the officers' knowledge that they might require a drug detection dog.

[14] Similarly in the instant situation the DEA agents knew they might need a drug detection dog. Nonetheless, they are not required to have a dog immediately available, only readily available. This is especially true when the officers are unsure where and when they might spot someone behaving in a manner to justify detaining the suspect's luggage.[3] The agents

[3] The First Circuit is in accord with our analysis. See *United States v. West*, 731 F.2d 90, 92 (1984) (the Fourth Amendment does

(Footnote continued on following page.)

here carefully informed Borys how he might retrieve his luggage, thus mitigating their intrusion on his rights. Consequently, while the instant situation is similar in many ways to the detentions found unreasonably in *Place* and in *Moya*, sufficient differences exist to justify our affirming the district court.

IV

[15, 16] Defendant's final contention is that he did not voluntarily give the agents permission to search his briefcase. The determination of consent is essentially a factual one, and we cannot overturn the district court's finding unless it is clearly erroneous. *Morgan*, 725 F.2d at 58. Moreover, the agents' statement to Borys that they meant to try to secure a search warrant for his luggage if he did not consent cannot by itself invalidate Borys' consent. *United States v. Dennis*, 625 F.2d 782, 793 (8th Cir.1980). The agents twice informed him of his right to refuse, a circumstance we have considered to be "highly relevant." *Morgan*, 725 F.2d at 58. Borys in fact exercised that right with regard to his other luggage, only consenting to the search of the briefcase because he preferred to take it with him.

The agents had adequate cause to detain the luggage, albeit only for a brief period of time, so that their demand that Borys either consent to the search of the briefcase or leave it with them was legitimate. Borys cannot argue that his consent was coerced merely because the agents had adequate grounds

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not require DEA agents to "have a dog waiting near the gate whenever a sniff test of a known suspect's baggage is either probable or possible"), certiorari denied, ____ U.S. ____, 105 S.Ct. 956, 83 L.Ed.2d 963. Had Borys elected to remain with the luggage until a sniff test had been performed, we might be less willing to countenance a seventy-five-minute delay. See *id.* at 93-94. But that issue is not before us, and we do not base our decision here on Borys' prior departure from the airport.

to insist they be allowed to retain the briefcase for a short period of time. Nor would his consent have been coerced even if his luggage had been detained an unreasonably long period of time, for the voluntariness of his consent should be analyzed in view of the circumstances at the time consent was given and not vitiated by later unforeseen developments. In the instant situation, we cannot say that the district court's finding of a voluntary consent to search the briefcase was clearly erroneous.

Because the government did not exceed the boundaries imposed by the Fourth Amendment as explicated by *Terry, supra*, and its progeny, the district court's judgment is affirmed.

APPENDIX B

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

August 21, 1985

Before

Hon. WALTER J. CUMMINGS, *Chief Judge*
Hon. RICHARD D. CUDAHY, *Circuit Judge*
Hon. WILBUR F. PELL, JR., *Senior Circuit Judge*

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
No. 84-1895 *vs.*
GLEN BORYS,
Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois.
No. 83 CR 561
Paul E. Plunkett,
Judge.

ORDER

On consideration of the petition for rehearing and suggestion for rehearing *en banc* filed in the above-entitled cause by appellant Glen Borys, no judge in active service has requested a vote thereon, and all of the judges on the original panel have voted to deny a rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

APPENDIX C

DOCKET NO. 83CR 561

JUDGMENT AND PROBATION/COMMITMENT ORDER

In the presence of the attorney for the government the defendant appeared in person on this date 05-17-84.

COUNSEL

☐ **Without Counsel** — However the court advised defendant of right to counsel and asked whether defendant desired to have counsel appointed by the court and the defendant thereupon waived assistance of counsel.

☐ **With Counsel** — MARVIN BLOOM

PLEA

☐ **GUILTY, and court being satisfied that there is a factual basis for the plea.** ☐ **Nolo Contendere,** ☒ **Not Guilty**

FINDING & JUDGMENT

There being a finding/verdict of

☐ **Not Guilty.** Defendant is discharged

☒ **Guilty.**

Defendant has been convicted as charged of the offense(s) of knowingly, wilfully and unlawfully possessed with intent to distribute approximately 973.19 grams of a mixture containing cocaine, a Schedule II Controlled Substance, as charged in the Indictment.

IN VIOLATION OF TITLE 21, U.S. CODE, SECTION 841(A)(1).

SENTENCE OR PROBATION ORDER

The Court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of EIGHTEEN (18) MONTHS with a Special Parole Term of THREE (3) YEARS to follow.

SPECIAL CONDITIONS OF PROBATION

Sentence is stayed pending appeal.

OPTIONAL CONDITIONS OF PROBATION

In addition to the special conditions of probation imposed above, it is hereby ordered that the general conditions of probation set out on the reverse side of this judgment be imposed. The Court may change the conditions of probation, reduce or extend the period of probation, and at any time during the probation period or within a maximum probation period of five years permitted by law, may issue a warrant and revoke probation for a violation occurring during the probation period.

COMMITMENT AND RECOMMENDATION

The court orders commitment to the custody of the Attorney General and recommends,

It is ordered that the Clerk deliver a certified copy of this judgment and commitment to the U.S. Marshal or other qualified officer.

By

U.S. District Judge

/s/ PAUL E. PLUNKETT

U.S. Magistrate

Date May 17, 1984

Supreme Court, U.S.
FILED
DEC 26 1985
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-761 (2)

In the Supreme Court of the United States

OCTOBER TERM, 1985

GLEN BORYS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the detention of petitioner was supported by reasonable suspicion.

2. Whether the detention of petitioner's luggage long enough to permit its exposure to a narcotics detection dog violated the Fourth Amendment because of its duration.

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-19a) is reported at 766 F.2d 304.

JURISDICTION

The judgment of the court of appeals was entered on June 27, 1985. A petition for rehearing was denied on August 21, 1985 (Pet. App. 20a). The petition for a writ of certiorari was filed on October 21, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a bench trial in the United States District Court for the Northern District of Illinois, petitioner was convicted on one count of possessing cocaine with intent to distribute, in violation of 21 U.S.C. 841(a)(1). He was sentenced to 18 months' imprisonment to be followed by a three-year special parole term. The court of appeals affirmed.

1. As summarized by the court of appeals (Pet. App. 1a-4a), evidence developed during a suppression hearing showed that at approximately 4:00 p.m. on September 4, 1981, DEA Agents Peter O'Brien and Milo Grassman were at Chicago's O'Hare Airport observing passengers deplane from a Delta Airlines flight originating in Orlando, Florida, a city known to them as a source city for narcotics. Their attention was drawn to petitioner, who was one of the first passengers to leave the plane. The agents observed that, although the first passengers to leave a plane ordinarily are well dressed businessmen from the first class section who would have checked their bags, petitioner was casually dressed with collar length hair and a Fu Manchu type mustache, and he was carrying two bulky pieces of luggage. The agents also noticed that, although the flight was on time, petitioner walked down the concourse in a rapid manner as if in a hurry and that he looked back in their direction as he walked. Pet. App. 1a-2a.

Their suspicion aroused, the agents began to follow petitioner but, because he was walking so rapidly, they lost sight of him by the time they reached the baggage claim area. After leaving the terminal, they located him near a livery stand. Petitioner then reentered the terminal, walked past the agents, and went into a luggage locker area. After approximately 15 seconds petitioner emerged, and the agents approached him, identified themselves, and requested to speak with him. Petitioner responded, "Sure, what do you want?" Agent O'Brien then asked him for identification, and petitioner replied that he had lost his wallet and asked if he could go to the Delta counter and inquire about it. Pet. App. 2a.

After the agents told petitioner that he could go inquire about his wallet, he returned to the upper level of the terminal and spoke with a Delta employee while the agents

watched from a distance. Agent O'Brien then asked petitioner whether he had airline tickets, to which he responded negatively. Upon further questioning, petitioner gave his correct name and stated that he was returning from a four-day trip to Orlando. Pet. App. 2a-3a.

Subsequently, Agent O'Brien observed the Delta employee give petitioner a ticket, and he asked petitioner whether he could see it. When petitioner complied, examination of the ticket revealed that it was a first class Chicago-Orlando round-trip ticket that had been purchased with cash and that petitioner had been in Orlando for ten days, rather than four days as he had claimed. Petitioner then informed the agents that he had to file a claim for his wallet. As he proceeded to the Delta baggage claim office to do so, the agents followed him and observed that he appeared to be visibly shaken and that he continuously dropped various items. When he requested permission to make a phone call, the agents assented; they observed that no party answered the call and that petitioner's nervousness continued. Pet. App. 3a.

Agent O'Brien then explained to petitioner that he and Agent Grassman had reason to believe that he was transporting drugs and requested permission to search his luggage. When petitioner refused to consent, the two agents returned to the vicinity of the Delta baggage office where they were joined by DEA Agents Anderson and Fulkerson. Agent Anderson observed petitioner remove a briefcase from one of his pieces of luggage. O'Brien then told him that, although he was not under arrest, the briefcase would be detained and an attempt made to procure a warrant to search it. When petitioner inquired whether he could keep the briefcase, Anderson responded that he could retain it if he first consented to a search of its contents. Although petitioner was advised of his right to refuse the search, he consented. The ensuing search revealed a tube with a black

plastic cap that contained a white powder residue and appeared to be paraphernalia to "free base" cocaine. Anderson then confiscated the tube and returned the briefcase to petitioner. He also wrote a receipt for the two pieces of luggage and explained how petitioner could retrieve them in the event that no warrant was obtained or no drugs found. Petitioner then left the airport at approximately 4:45 p.m. Pet. App. 3a-4a.

Following petitioner's departure, the agents took his luggage to the DEA's airport office where they contacted the Customs Service and requested the services of a drug detecting dog. When the dog arrived at approximately 6:00 p.m., it reacted positively to petitioner's luggage, indicating the presence of narcotics. A search warrant, based upon the dog's alert, was obtained from a state judicial officer at approximately 9:55 p.m., and the resulting search culminated in the discovery in both pieces of luggage of over two pounds of a mixture containing cocaine. Pet. App. 4a.

2. The district court denied petitioner's motion to suppress, and the court of appeals affirmed (Pet. App. 1a-20a). Addressing the claim that petitioner was unlawfully detained, the court of appeals explained (Pet. App. 9a-13a) that the agents' initial questioning of petitioner did not constitute a seizure until the point at which they stated that they suspected him of transporting drugs and requested permission to search his luggage. By that time, the agents had reasonable suspicion of criminal activity that supported an investigative detention, which never ripened into an arrest. The court also rejected the argument that the 75-minute detention of petitioner's luggage in order to subject it to a dog sniff was unreasonable (*id.* at 13a-18a), ruling that the detention "lies within the outer bounds of the Fourth Amendment." The court distinguished this Court's decision in *United States* v. *Place*, 462 U.S. 696 (1983), noting that the detention here was not the result of an

agent's lackadaisical failure to plan for the presence of a sniffing dog at the airport and that the agents did not mislead petitioner as to the contemplated disposition of his luggage.[1]

ARGUMENT

Petitioner contends that the agents here violated the Fourth Amendment in questioning him and in detaining his luggage for a dog sniff. These contentions were carefully considered by the court of appeals and were correctly rejected in an exhaustive opinion upon which we substantially rely. Moreover, the only dispute in this case is over the application of settled legal principles to the particular facts of this case. Accordingly, the petition presents no issue warranting review by this Court.

1. The court of appeals correctly held (Pet. App. 12a-13a) that, based upon the totality of the circumstances, the agents' detention of petitioner was based on reasonable suspicion. These circumstances included the facts that petitioner was arriving from a source city for narcotics, was attired inappropriately for a first class passenger, walked extremely fast with no apparent reason for doing so, appeared very nervous and dropped things when questioned, purchased an expensive ticket with cash, and, most important, lied to the agents when asked how long he had stayed in Orlando. Another factor identified by the court of appeals was petitioner's claimed inability to produce identification; contrary to petitioner's contention (Pet. 5-7), it was appropriate for the agents and the court to consider this

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[1]The court of appeals also upheld the district court's rejection of petitioner's claims that he was unlawfully seized when the DEA agents first approached him, that the investigative stop ripened into an arrest for which probable cause was required, and that he did not voluntarily consent to the search of his briefcase.

fact in assessing the degree of suspicion.[2] The court's conclusion that the totality of circumstances amounted to reasonable suspicion was correct. Compare *Florida* v. *Royer*, 460 U.S. 491, 503 (1983) (plurality opinion) (traveling under assumed name, paying cash for ticket, mode of checking luggage, and suspect's appearance and conduct in general constituted reasonable suspicion).

2. Petitioner contends (Pet. 9-10) that the court of appeals' failure to find that the detention of his luggage was illegal cannot be reconciled with *United States* v. *Place*, 462 U.S. 696 (1983). This factbound contention is without merit.

In *Place*, this Court upheld the practice of detaining luggage briefly in order to confirm or dispel a reasonable suspicion that it contains contraband. The Court concluded, however, that the 90-minute detention in that case was unreasonable. The Court observed (462 U.S. at 709-710 (footnotes and citation omitted)):

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[2]None of the authorities upon which petitioner relies suggest that it is unconstitutional to consider the suspect's refusal or failure to identify himself in making a determination whether there exists reasonable suspicion to detain him. In *Brown* v. *Texas*, 443 U.S. 47 (1979), this Court simply held that the officers there lacked reasonable suspicion to detain the defendant when they asked him for identification. The refusal to identify was the crime charged in that case, not, as here, a factor considered in determining whether there was reasonable suspicion of some other crime. Moreover, because Texas law made it a crime to refuse to identify oneself only if the individual had been lawfully seized, it was clear that the questioning could not be regarded as purely consensual. Brown was not free to refuse to answer the officers' questions; the opposite was true here (see Pet. App. 6a-8a). See generally *United States* v. *Mendenhall*, 446 U.S. 544, 556 (1980) (opinion of Stewart, J.). In *Moya* v. *United States*, 761 F.2d 322, 325 (7th Cir. 1984), and *United States* v. *Brown*, 731 F.2d 1491, 1494 (11th Cir. 1984), the courts said only that failure or refusal to identify oneself falls short of establishing probable cause to arrest.

> [I]n assessing the effect of the length of the detention, we take into account whether the police diligently pursue their investigation. We note that here the New York agents knew the time of Place's scheduled arrival at La Guardia, had ample time to arrange for their additional investigation at that location, and thereby could have minimized their intrusion on respondent's Fourth Amendment interests. Thus, although we decline to adopt any outside time limitation for a permissible *Terry* stop, we have never approved a seizure of the person for the prolonged 90-minute period involved here and cannot do so on the facts presented by this case. * * *
>
> Although the 90-minute detention of respondent's luggage is sufficient to render the seizure unreasonable, the violation was exacerbated by the failure of the agents to accurately inform respondent of the place to which they were transporting his luggage, of the length of time he might be dispossessed, and of what arrangements would be made for return of the luggage if the investigation dispelled the suspicion. In short, we hold that the detention of respondent's luggage in this case went beyond the narrow authority possessed by police to detain briefly luggage reasonably suspected to contain narcotics.

See also *United States* v. *Sharpe*, No. 83-529 (Mar. 20, 1985), slip op. 9-10 (emphasizing importance in *Place* of the finding that the police did not pursue their investigation diligently).

The court of appeals recognized that *Place* was the relevant authority; it carefully considered *Place* and found it distinguishable (see Pet. App. 16a-18a).[3] Most important,

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[3]We note at the outset that we do not agree that *Place* should be applied retroactively to this case. At the time of the events here, the

the court noted that the agents here were not anticipating petitioner's arrival with narcotics; therefore, they had no reason to have a drug detection dog immediately available to meet petitioner's flight from Orlando. This contrasts with *Place*, where the reason emphasized by the Court for finding a 90-minute detention too long was the agents' failure to take steps to have a dog ready to meet the incoming plane although their suspicion had already focused on Place. 462 U.S. at 709. Moreover, the Court relied in *Place* in part on the fact that the officers erroneously told the suspect that his bag was being taken to a judge (*id.* at 699, 710); here, the court of appeals found that agents did not "mislead [petitioner] regarding what they were doing with the bags" (Pet. App. 17a). Thus, the court of appeals correctly held that there were substantial differences between this case and *Place* that justified affirmance of the district court's judgment.[4]

There can be no serious suggestion that the decision in this case reflects a reluctance by the Seventh Circuit to follow *Place*. Indeed, in light of *Place*, the Seventh Circuit recently overturned a prior decision that had upheld a dog

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actions of the agents were clearly lawful under established Seventh Circuit law. See *United States* v. *Klein*, 626 F.2d 22 (7th Cir. 1980). The deterrent policies of the exclusionary rule cannot possibly be served by suppressing evidence obtained by police acting in accordance with judicially recognized standards. Because in the Seventh Circuit the decision in *Place* marked "a clear break with the past" (*Desist* v. *United States*, 394 U.S. 244, 248 (1969), established principles of retroactivity require that it not be applied to invalidate conduct that was clearly lawful at the time it was committed. See *United States* v. *Johnson*, 457 U.S. 537, 549-550 (1982). In any event, as discussed *infra*, the decision of the court of appeals is fully consistent with *Place*.

[4]Even if petitioner were correct (see Pet. 9) that *Place* holds that a 90-minute detention is always unlawful even if the police act diligently —an interpretation that this Court clearly appears to have rejected in *Sharpe*, slip op. 9—the decision below would still be consistent with *Place* because the detention was shorter than 90 minutes.

sniff detention. *Moya* v. *United States, supra*. The decision here is in accord with another post-*Place* decision involving similar facts. See *United States* v. *West*, 731 F.2d 90, 92-94 (1st Cir. 1984), cert. denied, No. 83-6885 (Jan. 21, 1985) (approving 60-minute luggage detention where police were found to have acted with due diligence even though sniffing dog not immediately summoned upon suspect's arrival). In sum, the decision below faithfully applies the legal principles established in *Place*, and the different result is based solely on the significant factual differences between the cases.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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